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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING
LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S
OPPOSITION TO DEFENDANTS'
MOTION *IN LIMINE* NO. 7 TO
EXCLUDE EVIDENCE AND
ARGUMENT REGARDING THE
INDEMNIFICATION AGREEMENT**

**[REDACTED VERSION OF DOCUMENT
SOUGHT TO BE SEALED]**

1 **I. INTRODUCTION**

2 Defendants' motion *in limine* No. 7 (Dkt. 921 ("MIL 7")) seeks to preclude all documents
 3 or communications regarding Uber's agreement to indemnify Mr. Levandowski and his companies
 4 for his theft of Waymo's files and misappropriation of the trade secrets contained therein.
 5 However, this indemnification evidence is highly relevant to show what Uber knew about Mr.
 6 Levandowski's theft and when Uber knew about it, which the Court held is "one of the key issues
 7 in the case." The indemnification evidence is also relevant to prove issues of bias and agency.
 8 Neither Fed. R. Evid. 402, 403, nor 411 bars this highly relevant evidence.

9 **II. THE INDEMNIFICATION EVIDENCE IS HIGHLY RELEVANT TO THE "KEY
 10 ISSUE" OF "WHAT UBER KNEW AND WHEN IT KNEW IT"**

11 As the Court has held, "one of the key issues in the case" is "what Uber knew and when they
 12 knew it," with "it" referring to Mr. Levandowski's theft of Waymo's files and misappropriation of the
 13 trade secrets contained therein. (6.14.17 Hearing Tr. at 40:10-11.) There is compelling evidence that
 14 Uber knew about this malfeasance quite early on, as evidenced by the negotiations and consummated
 15 agreement for Uber to indemnify Mr. Levandowski *for these specific acts*.

16 For example, [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]

20 By February 5, 2016, the parties were specifically discussing indemnity for "Bad Acts," including
 21 "downloading of files of [Google]." (Dkt. 855-8 at 9.) These indemnification discussions ultimately
 22 resulted in an Indemnification Agreement of April 11, 2016, by which Uber agreed to indemnify Mr.
 23 Levandowski for "Bad Acts" that expressly included misappropriation of Waymo's/Google's trade
 24 secrets. (Dkt. 790-2 at 2.)

25 In circumstances like these — where indemnification evidence is relevant to show a
 26 party's knowledge of potential wrongdoing — courts have regularly held that such evidence is
 27 admissible. *See, e.g., Procaps S.A. v. Patheon Inc.*, No. 1:12-CV-24356-JG, 2015 WL 11090665,
 28 at *6 (S.D. Fla. Oct. 19, 2015) ("the indemnity agreements are relevant to show Patheon's

1 decision-making process leading up to, and after, the Banner acquisition. Although Patheon
 2 alleges it did not consider the Banner acquisition to be unlawful or harmful to Procaps, Procaps
 3 contends that Patheon and its owners were well aware of the anticompetitive consequences of that
 4 acquisition, but proceeded anyway because the Banner deal was too lucrative to pass up.”); *see*
 5 *also id.* at *5 (“Indemnification agreements are admissible when relevant to prove a party’s
 6 knowledge”); *Galaxy Computer Servs., Inc. v. Baker*, 325 B.R. 544, 551 (E.D. Va. 2005) (“the
 7 indemnification agreement is probative evidence that Sullivan may have intended to engage in
 8 what he believed to be wrongful conduct or felt that he had already engaged in wrongful conduct
 9 with respect to Galaxy.”); *Sanford v. Ektelon/Prince Sports Grp., Inc.*, No. 8:97CV368, 1999 WL
 10 33544436, at *1-2 (D. Neb. Nov. 5, 1999) (admitting evidence of indemnification agreement and
 11 crediting argument “that the Indemnity Agreement is relevant to what the parties knew about
 12 whether the Astrospec (Prism) would meet the applicable safety standards for racquet sports.”).

13 Notably, the indemnification evidence in this case does not relate to a broad or generic
 14 indemnification that just coincidentally covers the document theft at issue in this case. Rather, the
 15 indemnification evidence shows that Uber *specifically* had this document theft in mind when
 16 negotiating over its indemnification of Mr. Levandowski and his companies. (Dkt. 855-8 at 9
 17 (listing “downloading of files” as an act potentially subject to indemnity).) Such specificity
 18 renders the indemnification evidence particularly relevant. As the *Galaxy* court explained:
 19 “Unlike a defendant in a typical case involving a liability insurance policy, where the insurer is not
 20 a party to the lawsuit, the party indemnifying Sullivan, CSI, is itself a Defendant in this case. The
 21 relationship and understanding between the Defendants with regard to liability for the acts that
 22 comprise this lawsuit are especially probative. Baker and Sullivan are not alleged to be
 23 Defendants who *happen to be* insured against the acts at issue in the case. Rather, Baker and
 24 Sullivan are alleged to have conspired with the entity that has agreed to indemnify them.” *Galaxy*,
 25 325 B.R. at 552 (emphasis in original). Here too, the indemnification evidence shows that Uber
 26 and Mr. Levandowski conspired to effectuate the specific wrongful conduct accused in this case.
 27 Thus, as in *Galaxy*, the indemnification evidence is “especially probative.”

1 Secondarily, the indemnification evidence is also relevant to help prove issues of bias and
 2 agency. For example, if Uber tries to minimize the wrongdoing on Mr. Levandowski, it would be
 3 relevant to show that Uber has every motive to minimize this wrongdoing since it is contractually
 4 on the hook for this wrongdoing. Similarly, the fact that Uber agreed to indemnify Mr.
 5 Levandowski and his companies is relevant to show whether these entities were acting as agents
 6 for Uber when they performed their wrongful acts.

7 **III. THE HIGH RELEVANCE OF THE INDEMNIFICATION EVIDENCE IS NOT**
 8 **SUBSTANTIALLY OUTWEIGHED BY ANY RISK OF UNFAIR PREJUDICE**

9 Defendants argue that the indemnification evidence should be excluded on Rule 403
 10 grounds, reasoning that “its only purpose is to unfairly suggest to the jury that Uber is liable for
 11 trade secret misappropriation simply because it entered into the Indemnification Agreement.”
 12 (MIL 7 at 3:19-20.) As discussed above, however, Uber’s indemnification of Mr. Levandowski is
 13 highly relevant to prove that Uber knew about and ratified Mr. Levandowski’s document theft and
 14 trade secret misappropriation. This does not constitute unfair prejudice; it instead constitutes
 15 compelling evidence on the “key issue[]” of “what Uber knew and when they knew it.” (6.14.17
 16 Hearing Tr. at 40:10-11.)

17 Defendants also argue that it would be unfairly prejudicial for Waymo to “rely[] on the
 18 February 5, 2016 email [discussed above] to argue that Uber knew or should have known of
 19 Levandowski’s improper downloading” (MIL 7 at 4:1-2.) Once again, Defendants are
 20 confusing probative evidence with unfair prejudice. The February 5 email is highly probative
 21 evidence that Uber knew about the improper downloading, and the Court has already explained
 22 that Uber’s knowledge is a key issue in this case. The fact that Defendants do not *like* this
 23 evidence — or the Uber knowledge that this evidence proves — does not create any unfair
 24 prejudice.

25 Defendants next argue that the indemnification evidence could create jury confusion
 26 because “Levandowski is not a defendant.” (*Id.* at 4:4-5.) This makes little sense. While Mr.
 27 Levandowski is not a defendant, his malfeasance and his relationship to Defendants are obviously
 28 central issues in this case. The jury will hear copious evidence about Mr. Levandowski regardless

1 of the indemnification evidence. It is thus meritless for Defendants to suggest that the
 2 indemnification evidence would inject the issue of Mr. Levandowski into this case. Similarly,
 3 there is no merit to Defendants’ argument that “introducing evidence of Uber’s indemnification of
 4 Otto Trucking, a co-defendant, would also confuse the issues for the jury.” (MIL 7 4:10-11.) Just
 5 as the jury will become well-acquainted with Mr. Levandowski over the course of trial, the jury
 6 will become well-acquainted with Otto Trucking. Other than conclusory attorney argument,
 7 Defendants never explain how Uber’s indemnification of Otto Trucking would confuse the jury.

8 Notably, the cases cited above — *Galaxy*, *Procaps*, and *Sanford* — all rebuffed Rule 403
 9 challenges to indemnification evidence when such evidence was relevant to a party’s knowledge
 10 of wrongdoing. *Galaxy*, 325 B.R. at 551-52; *Procaps*, 2015 WL 11090665 at *6; *Sanford*, 1999
 11 WL 33544436 at *1-2. The same result should hold here. Defendants have not articulated any
 12 reason why the relevance of the indemnification evidence is outweighed (much less *substantially*
 13 outweighed) by any legitimate prejudice concerns.

14 **IV. THE INDEMNIFICATION EVIDENCE IS NOT BARRED BY RULE 411**

15 Equally meritless is Defendants’ argument that the indemnification evidence is barred by
 16 Fed. R. Evid. 411. (MIL 7 at 1-2.) Indeed, the plain text of Rule 411 defeats Defendants’
 17 argument. This Rule states: “Evidence that *a person was or was not insured* against liability is
 18 not admissible to prove whether *the person* acted negligently or otherwise wrongfully. But the
 19 court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or
 20 proving agency, ownership, or control.” Fed. R. Evid. 411 (emphasis added). “The person” in
 21 Rule 411 refers back to “a person [who] was or was not insured.” Thus, assuming for the sake of
 22 argument that indemnification qualifies as “insurance” under Rule 411, Rule 411 would bar
 23 introduction of the Indemnification Agreement for the purpose of proving that the “insured” —
 24 *e.g.*, Mr. Levandowski — acted negligently or wrongly. By contrast, as explained above, Waymo
 25 will use the Indemnification Agreement and related evidence to show the knowledge of the
 26 “*insurer*” — Uber. By its plain terms, Rule 411 does not prohibit this in any way. It imposes no
 27 restrictions on use of liability insurance against the *insurer* — only against the *insured*.
 28

Moreover, even when an indemnification agreement is offered as evidence against an indemnitee (*i.e.* the “insured”), it is admissible to prove that party’s knowledge. *Procaps*, 2015 WL 11090665 at *6; *Galaxy*, 325 B.R. at 551; *Sanford*, 1999 WL 33544436 at *1–2. Here, as explained above, the indemnification evidence is offered to prove Uber’s knowledge of Mr. Levandowski’s malfeasance. So even if Uber were the “insured” (as opposed to the “insurer”), this is a permissible use of indemnification evidence under Rule 411.

Finally, Rule 411 expressly states that it does not bar the introduction of indemnification evidence to show “bias” or “agency.” As explained in Section II, *supra*, the indemnification evidence here can be used to show Uber’s bias and to show that Mr. Levandowski and his companies acted as agents for Uber. For this reason as well, the indemnification evidence is not barred by Rule 411.

V. THE FEBRUARY 5 EMAIL (AND OTHER EVIDENCE OF INDEMNIFICATION NEGOTIATIONS) IS NOT BARRED BY THE PAROL EVIDENCE RULE

Defendants finally argue that, even if the Indemnification Agreement is admitted into evidence, the Court should bar all evidence about the negotiation of that agreement, including the February 5 email discussed above. (MIL 7 at 5-6.) Specifically, Defendants argue that this evidence should be barred under the parol evidence rule. (*Id.*) But this argument is meritless as well. As Defendants admit, “[t]he parol evidence rule ‘generally prohibits the introduction of any extrinsic evidence, whether oral or written, *to vary, alter, or add to the terms of an integrated written agreement.*’” (*Id.* at 5:6-7) (emphasis added). By contrast, Waymo is not offering the February 5 email (or any other negotiation-related evidence) “to vary, alter, or add to the terms of an integrated written agreement.” In other words, Waymo is not offering this evidence to vary, alter, or add to the terms of the Indemnification Agreement. Instead, Waymo is offering this evidence as free-standing, independent evidence of “what Uber knew and when they knew it.” By way of illustration, the negotiation evidence would be probative of Uber’s knowledge even if no final Indemnification Agreement was ever struck. Because the negotiation evidence is not being used to vary, alter, or add to the terms of any final written agreement, the parol evidence rule is simply beside the point.

1 **VI. CONCLUSION**

2 For the foregoing reasons, Waymo respectfully requests that Defendants' motion *in limine*
3 No. 7 be denied.

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5 DATED: July 21, 2017

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LLP

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7 By /s/ Charles K. Verhoeven

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